

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Bonnie Bryson and Claire Shepardson,
on behalf of themselves and
all others similarly situated,
Plaintiffs

Civil No. 99-cv-558-SM
Class Action

v.
John Stephen, in his capacity
as Commissioner of the State of
New Hampshire Department of
Health and Human Services; and
Matthew Ertas, in his capacity
as Director of the State of
New Hampshire Bureau of
Developmental Services,
Defendants

O R D E R

Plaintiffs' motion to exclude expert testimony or,
alternatively, to compel production of expert reports, does not
present a clear conflict subject to resolution. Fed. R. Civ. P.
26(a)(2)(B), requires expert witness reports to be provided if
the anticipated expert witness is "retained or specially employed
to provide expert testimony in the case, or whose duties as an
employee of the party regularly involve giving expert testimony
. . . ."

The rule will be honored. Plaintiffs apparently think some employees likely to be called by the state are assigned duties that regularly involve giving expert testimony, and so should have provided a report. The state disputes that general assertion. Although a pretrial hearing could be held, and the bases for challenging each anticipated employee could be explored, the better and more efficient approach is to entertain plaintiffs' objections at trial. This is a bench trial; the state may or may not call the nine or so witnesses it has disclosed; some or all of those witnesses may not offer expert opinion testimony; and some or all of those who do seek to provide expert opinion testimony may or may not have duties that involve regularly giving expert testimony.

The motion (document no.72) is denied, without prejudice to interposing appropriate objections at trial. Defendants' counsel will be expected to lay a proper foundation before offering employee expert opinion testimony where no expert report has been provided, and, of course, the risk that such testimony will be excluded falls squarely upon the state.

SO ORDERED.

Steven J. McAuliffe
United States District Judge

September 27, 2005

cc: Amy B. Messer, Esq.
Suzanne M. Gorman, Esq.